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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
FILED
HARRISBURG

DAVID KEBE
Petitioner

NOV 15 2000

DOCKET: CV 100-1883

VS

MARY E. D'ANDREA CLERK
Per *[Signature]*
DEPUTY CLERK

JUDGE: Kane *[checkmark]*

IMMIGRATION AND NATURALIZATION
SERVICE

MAGISTRATE JUDGE: BLEWITT

MOTION TO REVIEW THE MAGISTRATE JUDGE'S DETERMINATION
PURSUANT TO RULE 72.3.

COME NOW, Petitioner David Kebe in the above at course of action file this Motion to review the Magistrate Judge report and recommendation again to the Petitioner of Writ Of Habeas Corpus Under 2241.

In support of this Motion, Petitioner states as follows:

Following the oral argument in the Third Circuit, INS enacted interim rules which the NGO, court found to provide reasonable assurance of fair consideration of a Petitioner's application for Parole pending removal, " Id at 399, they included, inter alia: 1) written notice to the alien thirty days prior to the custody review that maybe present information supporting a release. 5) the opportunity for review by INS headquarters. 7) A refusal to presume continued detention based on criminal history.

Magistrate judge, recommended the Habeas Corpus be DENIED. the petitioner is scheduled for another review within six (6) months the appropriate safeguards continue to be taken by INS, with respect to the prolonged detention of petitioner.

1. ISSUE

Petitioner implore this honorable court to review Magistrate Judge recommendation with exhibits presented heretofore as evidence of the Immigration and Naturalization's failure to abide by the memorandum. Issued on August 6, 1999, that set the standards and procedure for DPO'S and District directors to follow in order to properly and fairly conduct the reviews of each case presented, and for this Honorable Court to determine what would warrant the INS to deny Petitioner release from INS custody, pending deportation as provided under 8 U.S.C. § 1231 (3), based solely in irreversible facts that are on Petitioner's criminal record, not only once but three times.

1. REVIEW

Petitioner custody was reviewed on October 22, 1999 and the petitioner receive a written notification on January 27, 2000 which itself is blatant violation of the August 6, memorandum which points out in section 7 of page 3.

"WITHIN THIRTY DAYS OF THE DISTRICT DIRECTOR'S CUSTODY REVIEW, THE ALIEN MUST RECIEVE WRITTEN NOTIFICATION OF A CUSTODY DECISION!"

(DOC 1 EXHIBIT C)

2. REVIEW

The review was scheduled for 3/2/00. On 4/28/00 again after 56 days the petitioner was served with a decision which does not even have a signature of the district director whom has rendered the decision Preliminary decision (DOC 1 EXHIBIT E). Petitioner is still waiting for INS.HQ final decision. Please find Exhibit. 1.....

3. REVIEW

On September 7, 2000 petitioner was served a notice to alien of file custody review. (Alternate Review.) which was scheduled for September 5, 2000, petitioner brought that facts to the DPO, Mr David O' Neill, that the notice is two days late and is being served without a Proof Of Service attending to the date, to which it was being served. The tardiness of service by DPO prevented petitioner the chance to prepare and submit the proper evidence in order to demonstrate his eligibility for release. (DOC 1 EXHIBIT F).

On 10/13/2000 petitioner was denied for the third straight time for the same exact reasons, (his criminal history), it is clear that INS is in violation of the interim rules of procedures which state in section 6:

"THE FACT THAT THE ALIEN HAS A CRIMINAL HISTORY DOES NOT CREAT A PRESUMPTION IN FAVOR OF CONTINUED DETENTION."

Futhermore, petitioner would like to point out to this Honorable Court the decision rendered by U.S. Court of Appeals for the Third Circuit in NGO V. INS, 192 F. 3d 390. (3rd cir 1999) Id. 399 (13) the court opined:

THAT COURT NOTED ITS DISSATISFACTION WITH EARLIER INS REVIEW PROCEDURES, RECITING CRITICISM THAT, DIRECTORS SIMPLY RELY ON THE ALIENS PAST CRIMINAL HISTORY AND THE FACT THAT THEY WERE FACILITATING REMOVAL FROM THE UNITED STATES, SUMMARILY CONCLUDING THAT THE ALIENS POSED SUCH RISKS AND DENYING THEM RELEASE. ID. WE AGREE THAT SUCH SUPERFICIAL REVIEW IS NOT SATISFACTORY AND DOES NOT AFFORD DUE PROCEDURE.

In that the Circuit Court clearly was startling do not want the INS to provide superficial reviews". or to " rubberstamp" denials of release, as it has been done in petitioner's case.

It is understandably clear that petitioner has a history of violence, however, INS reasons to deny him release bond, solely on those irreversible facts is clearly unwarranted.

Also petitioner would like to know what INS means by demonstrated by clear and convincing evidence that he would not present a threat to society and petitioner had not shown that he would not present a flight risk, petitioner has only a daughter and girlfriend in this country.

The appropriate safeguards continue to be been taken by INS with respect to prolonged detention of the petitioner. Petitioner alleges that due process is not satisfied, presenting petitioner danger to the community at one point by committing crime does not place petitioner forever beyond redemption.

All these failures to review on time, and properly give decision notice prove that INS is not complying with their review process and the guidelines, which shows that the review is not object or rigorous and therefore, does not satisfy the due process described by NGO.

Again, this leads to conclude that in absence of due process petitioner detention is unlawful and must end.

Petitioner serving only 30 days in prison sentence and in INS custody for 20 months.

CONCLUSION

WHEREFORE, the petitioner respectfully requests that this Honorable Court, and the Honorable Judge Yvette Kane conduct a de novo review of this matter, reject the decision of the Magistrate Judge, report and recommendation, Rendered on November 7, 2000.

Respectfully, Submitted

Kebe David

David Kebe, Petitioner
600 Old Colony Road
Selinsgrove, Pa 17870.

11-13-00
Date

IMMIGRATION COMMUNICATION FORM

FROM: KEBE DavidA# A75805HOUSING ASSIGNMENT: B16

COMMUNICATION (WRITE LEGIBLY AND SUPPLY ALL RELEVANT DETAILS. YOUR FAILURE TO SPECIFICALLY STATE YOUR PROBLEM MAY RESULT IN NO ACTION BEING TAKEN.)

ATTENTION Mr. O'Neill.

(1)

This is the third time my Review was deny by you.
Therefore, I am requesting a copy from the district director
decision that was send to INS Head quarter in Washington for Review
and the decision for Washington Headquarter.
The 1st file Review I got the all decision Headquarter decision from you
the second and third not.
Which I assume you have in your possession.

*NOTE: ENSURE THAT ALIEN NUMBER (A#) IS ON ALL CORRESPONDENCE.

SIGNATURE Kebe David 10.31.00 Very Truly yours.

RESPONSE:

DATE: 11-3-00 IMMIGRATION OFFICER: O'NEILL

MR. KEBE. ONLY THE Reviews in which there
is an interview are sent to HQ. Your 1st
and 3rd reviews do not go to INS Head
Quarters.

SNYDER COUNTY PRISON COMMUNICATION FORM

AUG-06-1999 14:28

202 514 8044 P.02/02



U.S. Department of Justice
Immigration and Naturalization Service

HQOPS 50/14.6-C

Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

AUG 6 1999

MEMORANDUM FOR ALL REGIONAL DIRECTORS
DISTRICT DIRECTORS
OFFICERS IN CHARGE

FROM:

Michael A. Pearson
Michael A. Pearson
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Interim Changes and Instructions for Conduct of Post-order Custody Reviews

This memorandum addresses several changes to current procedures regarding post-order detention procedures for aliens whose immediate repatriation is not possible or practicable.¹ Current regulations, 8 C.F.R. § 241.4, provide that the decision whether to detain or release such an alien is made by the District Director. In the near future, the Service will begin the rulemaking process to propose a program modeled after the Cuban Review Plan of 8 CFR section 212.12 to address post-order custody cases. The custody of Mariel Cubans will continue to be governed by 8 CFR 212.12. Until this more permanent program is implemented, several changes are being made to the current procedures set forth in the memoranda of February 3, and April 30, 1999. These changes are effective immediately. All offices will follow identical procedures in conducting reviews of post-order custody cases, using the forms listed at the conclusion of this memorandum. The forms will be distributed to all offices.

The Attorney General and the Commissioner have agreed that these procedures, as detailed below under the heading "Interim Procedures," will include written notice to the alien of custody reviews. The notice will advise the alien that he may present information supporting a release, and he may be assisted by an attorney or other person at no expense to the government. The alien will receive an in-person interview at the first custody review following expiration of the removal period. Thereafter, the alien will receive a separate notice of the opportunity for an annual interview. The alien will be provided written reasons for INS custody decisions.

¹ See the memoranda from Michael Pearson, Executive Associate Commissioner for Field Operations, February 3, 1999: Detention Procedures for Aliens Whose Immediate Repatriation is Not Possible or Practicable, and April 30, 1999: Supplemental Detention Procedures.

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202 514 8044 P.03

MEMORANDUM FOR ALL REGIONAL DIRECTORS

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DISTRICT DIRECTORS

OFFICERS IN CHARGE

SUBJECT: Interim Changes and Instructions for Conduct of Post-order Custody Reviews

The District Director will continue to make custody determinations within the ninety-day removal period under the memoranda of February 3, and April 30, 1999. The next scheduled review shall be nine months from the date of the final administrative order of removal or six months after the last review, whichever is later. That review will include an interview and is subject to review at INS Headquarters if the District Director has determined that the alien should remain in custody. Thereafter, reviews will be conducted at six-month intervals, alternating between a file review by the District Director (without an interview unless the District Director, in his discretion, determines that one would be useful, and without Headquarters review), and a review with the opportunity for an interview at the alien's request and with Headquarters review.

No case subject to a Headquarters review will be considered a final custody decision until the District level decision has been ratified through the Headquarters review or resolved after referral back to the District. If the Headquarters reviewer concludes that the District Director should reconsider his decision or that further documentation is required to support the District Director's decision, the case shall be forwarded to the Regional Office with a cover memorandum and instructions to refer the case back to the District for further consideration or documentation. The Headquarters reviewer shall detail the issues that resulted in the referral and forward the case to the Regional Office.

Regional Directors are responsible for working with the District Director to comply with the Headquarters instructions on referrals. In addition, the Regional Director is responsible for preparation of statistics on the custody reviews conducted in each district.

INTERIM PROCEDURES

- (1) Pursuant to the provisions of 8 C.F.R. § 241.4, the District Director will continue to conduct a custody review of administratively final order removal cases before the ninety-day removal period mandated by § 241(a)(1) expires for aliens whose departure cannot be effected within the removal period.
- (2) These procedures apply to any alien ordered removed who is inadmissible under § 212, removable under 237(a)(1)(C), 237(a)(2), or 237(a)(4) or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal. They cover aliens convicted of an aggravated felony offense who are subject to the provisions of old INA § 236(e)(1) - (3), and non-aggravated felon aliens with final orders of exclusion. Mariel Cubans are excluded from these procedures as parole reviews for them are governed by 8 C.F.R. § 212.12. The ninety-day review will be conducted pursuant to the instructions set out in the memoranda of February 3 and April 30, 1999. District Directors may, in their discretion, interview the alien if they believe that an interview would facilitate the custody review.

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MEMORANDUM FOR ALL REGIONAL DIRECTORS
DISTRICT DIRECTORS
OFFICERS IN CHARGE

SUBJECT: Interim Changes and Instructions for Conduct of Post-order Custody Reviews

- (3) Following expiration of the ninety-day removal period, the next scheduled review provided by the District Director shall be nine months from the date of the final administrative order of removal or six months after the last review, whichever is later. Written notice shall be given to each alien at least 30 days prior to the date of the review. The notice will be provided either by personal service or certified mail/return receipt. The notice shall specify the factors to be considered and explain that the alien will be provided the opportunity to demonstrate by clear and convincing evidence that he is not a threat to the community and is likely to comply with the removal order.
- (4) For the review discussed in paragraph 3 above, an interview is mandatory and the District Director's preliminary decision will be subject to Headquarters review. Thereafter, custody reviews will be conducted every six months, alternating between District Director file reviews and a review that includes the opportunity for an interview at the alien's request and a Headquarters review of detention decisions. A separate notice will advise the alien of the opportunity for the interview. The alien may check the appropriate box on the notice, returning the form provided within 14 calendar days so that an interview may be scheduled. The District Director has the discretion to schedule further interviews if he determines they would assist him in reaching a custody determination.
- (5) The alien must be advised that he may submit any information relevant to support his request for release from detention, either in writing, electronically, by U.S. mail (or any combination thereof), or in person if an interview is conducted. The alien must also be advised that he may be represented by an attorney, or other person at no expense to the government. If an interview has been scheduled, the alien's representative may attend the review at the scheduled time.
- (6) The District Director may delegate custody decisions to the level of the Assistant District Director, Deputy Assistant District Director, or those acting in their capacity. Custody determinations will be made by weighing favorable and adverse factors to determine whether the detainee has demonstrated by clear and convincing evidence that he does not pose a threat to the community, and is likely to comply with the removal order. See 8 C.F.R. § 241.4. The alien's past failure to cooperate in obtaining a travel document shall be considered an adverse factor in determining eligibility for release. See INA § 241(a)(1)(C) Suspension of Period. The fact that the alien has a criminal history does not create a presumption in favor of continued detention.
- (7) Within thirty days of the District Director's custody review, the alien must receive written notification of a custody decision. All notification will be provided either by personal service or certified mail/return receipt. A decision to release should specify the conditions of release. A decision to detain will clearly delineate the factors presented by the alien in support of his release, and the reasons for the District Director's decision.

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MEMORANDUM FOR ALL REGIONAL DIRECTORS
DISTRICT DIRECTORS
OFFICERS IN CHARGE

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- (8) With respect to those detain decisions that are subject to Headquarters review under paragraph 4, the District Director's determination that the alien should be detained is to be regarded as only preliminary. In those instances, the Regional Directors will forward the preliminary detain decisions to Headquarters for review. Headquarters review will be conducted by Operations and Programs representatives (with assistance from the Office of General Counsel as necessary). Where the Headquarters reviewer's decision concurs with the District Director's, the Headquarters reviewer will write a supporting statement and will seek concurrence from a second Headquarters reviewer. Where the two reviewers differ, a panel of three Headquarters reviewers will conduct a further review of the case. The Headquarters panel may ratify the District Director's decision, return the case to the District Director to reconsider his decision, or determine that additional information is required to make a decision. The Headquarters review must be completed within thirty days of file receipt. The Headquarters review conclusions will be forwarded to the Regional Director for distribution to and appropriate action by the District Director.
- (9) The District Director will review his decision in light of the Headquarters recommendations and will notify the alien of the final custody determination within thirty days of completion of the Headquarters review.
- (10) The District Director should make every effort to effect the alien's removal both before and after expiration of the removal period. All steps to secure travel documents must be fully documented in the alien's file. However, if the District Director is unable to secure travel documents locally after making diligent efforts to do so, then the case shall be referred to Headquarters OPS/DDP for assistance. More detailed instructions will be issued from the Executive Associate Commissioner for Operations by separate memorandum.
- (11) On August 30, 1999, and on the last workday of each quarter (September, December, March, June) each district shall submit a custody review status report to its Regional office and to Headquarters. There will be more detailed instructions issued on reporting procedures at a later time.

AUG-06-1999 14:30

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FORMS [to be distributed]

- (a) Notice to Alien
- (b) Notice of Interview
- (c) Detained Alien Custody Review Worksheet
- (d) Decision of Custody Review
- (e) Decision to Continue Detention
- (f) Decision to Release
- (g) Custody Review Status Report